

In re Directives to [Provider]<sup>1</sup> Pursuant  
to Section 105B of the Foreign  
Intelligence Surveillance Act

No. 105B(g07-01)

JUN 14 2013

U.S. Foreign Intelligence  
Surveillance Court OF REVIEW

**PROVIDER'S UNCLASSIFIED MOTION UNDER FISC RULE 62 FOR  
PUBLICATION OF THIS COURT'S DECISION AND OTHER RECORDS**

Provider moves under FISC Rule 62(a) to request this Court to order publication of the Court's decision in the above-captioned case, which was appealed to the Foreign Intelligence Surveillance Court of Review ("FISCR") and ultimately resulted in the publication of the redacted decision in *In re Directives [redacted] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (Foreign Intel. Surv. Ct. Rev. 2008). Although the FISCR decision was published in redacted form, this Court's decision has never been published nor have the parties have previously sought publication. The FISCR disclosed the fact of this Court's decision and a general description of the decision, but a more fulsome release of the decision is now warranted in light of: (a) recent declassification decisions by the Director of National Intelligence ("DNI"); (b) the current controversy surrounding the use of directives issued under Section 702 of the FISA Amendments Act of 2008 ("FAA") and under Section 105B of its

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<sup>1</sup> This motion is being filed on behalf of the Provider that was a party to this case. Provider's name is being redacted so that this motion may be released publicly. The undersigned counsel represents that Provider is in fact the same Provider that was a party to this case, and that this filing is made with its authorization.

predecessor, the Protect America Act of 2007 (“PAA”), and (c) recently-filed litigation regarding the constitutionality of Section 702. Accordingly, release of this Court’s decision upholding the constitutionality of those directives, as well as the legal arguments contained in the briefs, is now in the public interest.

### **Argument**

FISC Rule 62(a) allows this court to publish its decisions and direct the Executive Branch to review and redact those decisions for release to the public. FISC Rule 62(b) allows for the publication of other records upon Court Order, in accordance with Rule 3. More specifically, FISC Rule 62(a) provides that “[t]he Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).” Provider, as a party to this case, respectfully requests under Rule 62 that this Court publish its decision and allow public release of the briefs filed by Provider and the Government.

Here, release of the decision of the court and the legal arguments raised in the briefs is in the public interest. Recent developments, including (a) recent declassification decisions by the Director of National Intelligence (“DNI”); (b) public controversy surrounding the use of directives issued under Section 702 of the FISA Amendments Act of 2008 (“FAA”) and under Section 105B of its predecessor, the Protect America Act of 2007 (“PAA”), and (c) recently-filed litigation regarding the constitutionality of Section 702,<sup>2</sup> has brought attention to the use of the directive process and its legality. Accordingly, release of this Court’s decision upholding the constitutionality of those directives, as well as the legal arguments contained in the briefs, is now in the public interest.

Provider expects that prior to release, as directed by Rule 62(a), the Court will consult with the Executive Branch to ensure that the opinion is appropriately redacted for public release. As part of that process, Provider requests that the identity of the Provider and its counsel be made public along with the decision.<sup>3</sup> Although Provider’s name was redacted from the FISC’s decision nearly five years ago, intervening developments, including the recent declassification and release of certain information by the DNI, no longer justifies the continued redaction and creates prejudice to the rights of Provider.

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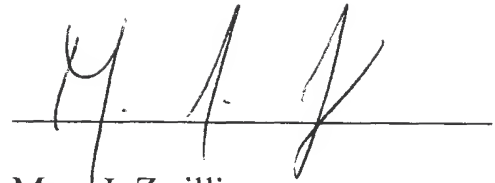
<sup>2</sup> *Klayman et al. v. Holder*, No. 13-cv-00881 (D.D.C. June 12, 2013).

<sup>3</sup> Provider has filed a similar request seeking disclosure of its name and its counsel’s name in the FISC.

## **Conclusion**

Provider respectfully requests that this Court: (1) enter an order designating this decision for publication; (2) direct the Executive Branch to review the opinion and redact as appropriate for publication; (3) direct the Executive Branch to revisit the classification of Provider and its counsel's identity, and (4) publish this instant motion in the Court's public docket.

Date: June 14, 2013

A handwritten signature in black ink, appearing to read 'M. J. Zwillinger', is written over a horizontal line.

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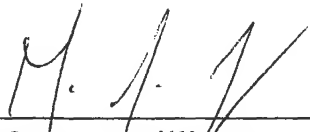
## **CERTIFICATE OF SERVICE**

I, Marc J. Zwillinger, hereby certify that on June 14, 2013 I hand delivered  
“Provider’s Unclassified Motion Under FISC Rule 62 for Publication of This  
Court’s Decision and Other Records” on:

Christine Gunning  
Department of Justice  
145 N St NW  
Washington, DC

Pursuant to procedures established by the Security and Emergency Planning Staff,  
United States Department of Justice under FISC Rule 8.

Date: June 14, 2013

  
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Marc J. Zwillinger